

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 05-cv-329-GKF-PJC
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

**STATE OF OKLAHOMA'S RESPONSE TO DEFENDANTS' JOINT  
MOTION *IN LIMINE* TO EXCLUDE REFERENCES TO BACTERIA, AND  
BACTERIA-RELATED DISEASES OR OTHER ALLEGED ADVERSE  
HUMAN HEALTH EFFECTS ASSOCIATED WITH ANYTHING  
OTHER THAN PHOSPHORUS [DKT #2408]**

The State of Oklahoma ("the State") hereby submits this response in opposition to Defendants' Joint Motion *in Limine* To Exclude References To Bacteria, and Bacteria-Related Diseases or Other Alleged Adverse Human Health Effects Associated with Anything Other Than Phosphorus ("Defendants' Motion") [Dkt. #2408]. Based on the following the Court should deny Defendants' Motion.

**Introductory Statement**

Defendants, having lost their motions for summary judgment attacking the State's causes of action relating to the bacteria risks arising from the spreading of the fecal waste from their poultry operations upon the thin soils of the IRW and having lost their motions for summary judgment alleging a lack of proof of their individual causation as to the bacterial risks that exists in the streams of the IRW, now attempt to prevail in those faltering efforts through an ill conceived motion *in limine*.

Defendants, though, not only lost their motions for summary judgment, they also lost in their efforts to exclude Dr. Teaf's evidence analyzing the relative bacteria load for

which poultry is responsible, an established means of demonstrating the source of bacterial contamination in recreational waters. They did not even challenge the evidence offered by Dr. Fisher as to how bacteria from poultry moves through this environment. And while both Drs. Olsen and Harwood offered multiple lines of evidence supporting the responsibility of poultry waste for the high bacteria levels found in the waters of the IRW, Defendants only succeeded in excluding their testimony relating to PCR and PCA. And finally, Defendants also lost in their effort to turn back this case through their *Daubert* motions.

The only success Defendants have had in this regard is to exclude the PCR and PCA evidence proffered by Drs. Harwood and Olsen. The remainder of the State's bacteria case remains intact. In fact, the Court of Appeals has found that even without PCR and PCA, the State's bacteria case sets forth one of "two permissible views of the evidence." *Oklahoma v. Tyson*, 565 F.3d 769, 777 (10th Cir. 2009). Defendants last ditch effort to prevent this evidence from being presented at trial is without merit.

The State will show that the land application of poultry waste can cause adverse human health effects pursuant to the RCRA standard of imminent and substantial endangerment. It will also do so pursuant to the federal common law nuisance "significant threat of injury" standard, the 27A Okla. Stat. § 2-6-105A "likely to cause pollution," and state law nuisance "reasonably degree of probability" standard. However, before State discusses this standard and the evidence it will produce at trial, there are several factual mischaracterizations and misrepresentations of the evidence employed by the Defendants in their Motion. These statements were likely offered in order to confuse the facts and issues in this case. These mischaracterizations are identified below.

- The Defendants wrongly state: “Throughout this case [the State] has made numerous allegations that poultry litter has caused disease and other adverse human health effects in the IRW.” Defendants’ Motion, DKT #2408, p. 1. This is simply misleading and not true. The State has consistently alleged and will prove that poultry litter, under the RCRA standard, presents an *imminent and substantial endangerment* in accordance with the legal standard set out below
- Defendants contend that the State has alleged numerous adverse health effects from poultry bacteria with no expert opinion supporting such allegations. Defendants’ Motion, DKT #2408, p. 1 n.1. In fact, the State has offered expert opinion connecting adverse health effects and diseases related to poultry waste. *See* DKT #2067, Ex. 3, para. 12-14, 25, 31-33 & 35 (Teaf Report); DKT #2028 Ex. 3 (Harwood Report), para. 6-10, 12-20 & 28-34; DKT #2115, Ex. C, para. 1-19 (Harwood Decl.).
- Defendants make much of deposition testimony where Dr. Fisher explained that the contaminants of concern in the IRW are “phosphorus and bacteria.” Defendants’ Motion, DKT #2408, p. 2, Ex. 1 (Fisher Depo. at 516:9-17 and 615:4-616:19). Defendants lift this quote out of context and mischaracterize it to claim that there are no hazards associated with Defendants’ land disposal practices. Dr. Fisher correctly identifies as the “contaminants of concern,” but it was not his task to opine on the level of risk or hazard associated with the bacteria contained in that waste.
- Defendants state: “None of [the State’s] experts other than Harwood and Olsen offers any testimony directly linking bacteria found in the IRW waters with

bacteria from poultry litter.” Defendants’ Motion, DKT #2408, pp. 2-3. Again, this is simply false. The PCA and PCR were only two of many lines of evidence that prove that Defendants’ bacteria in its poultry waste are polluting IRW waters. For example, Dr. Teaf offers an opinion as to the link between bacteria in poultry waste and the waters of the IRW through a mass balance of bacteria from IRW sources. *See* DKT #2067, Ex. 3 ¶¶ 12-14, 31-33 & 35 (Teaf Report). Further, contrary to Defendants’ suggestion, Dr. Valerie Harwood’s (Dr. Harwood) opinions have not been excluded entirely. *See* DKT #2386. In fact, Dr. Harwood relied on many other lines of evidence to come to her conclusions regarding the human health effects of bacteria from poultry waste in the IRW. DKT #2028 Ex. 3, para. 6-10, 12-20 & 28-34 (Harwood Report); DKT #2115, Ex. C ¶¶ 3, 19 and 45 (Harwood Decl.).

The volume of waste and its method of management were also relied upon by Dr. Harwood to support her opinions concerns Defendants’ bacterial laden waste reaching IRW waters. Furthermore, Dr. Fisher demonstrates that the geology of the IRW provides transport pathways for bacteria through surface water runoff and groundwater infiltration. *See*, Exhibit, 1 (Fisher Report, pp. 42-46). Furthermore, Dr. Olsen opines that the levels of bacteria in field samples of poultry waste, as well as in samples from edge of field runoff and in each environmental compartment leading to the Lake show that bacteria from land applied poultry waste runs off of land application areas and contaminates groundwater wells. *See*, Exhibit, 2, pp. 1-2, 6-4 – 6-19 & Table 6.4-3 (Olsen Report).

In addition to expert testimony, there are government reports linking land-applied poultry waste with bacteria in the waters of the IRW. *See* DKT #2125 (Fact #27, Exs. 73, 74, 75, 76, 77.)

- Defendants state: “Without expert testimony establishing a causal link between bacteria in the IRW and poultry litter, [the State] cannot establish a causal link between poultry litter and bacteria-related diseases or other adverse human health effects.” DKT #2408, p. 3. This is a back-door reassertion of the Defendants’ motion for summary judgment on the State’s bacteria case under RCRA, which the Defendants abandoned at oral argument in light of the fact the Court rejected their *Daubert* challenge to Dr. Teaf’s testimony. Having abandoned that challenge to the sufficiency of the State’s evidence, Defendants cannot now seek to exclude what is unquestionably sufficient evidence. The State has already demonstrated above that it will establish a causal link between Defendants’ poultry waste and an endangerment or threat to human health.
- Defendants state: “[The State] also lacks tangible evidence of poultry-litter related pathogens or bacteria-caused disease in the IRW.” DKT #2408, p. 3. This mischaracterizes the State’s burden of proof. The State is not required to demonstrate harm or diseases in the IRW from the Defendants’ bacteria. Rather, under RCRA the State is required to demonstrate an *endangerment* while the law of public nuisance will enjoin a *threat* to public health. Public health law and policy allows the State to act to protect the public *before* people start getting sick or suffer from disease. That is the RCRA standard discussed below. Indeed, the scientific literature is clear that non-food borne causes of sickness and disease are

equally as important as food borne causes. *See* Exhibit 3, Denno et. al., *Tri-County Comprehensive Assessment of Risk Factors for Sporadic Reportable Bacterial Enteric Infection in Children*, JID, Vol. 19 (Feb. 15, 2009).

- Defendants claim that the state agencies of Oklahoma have “roundly rejected” the need for epidemiological studies of bacteria in the IRW. DKT #2408 p. 3. For this proposition Defendants offer several citations to depositions of state officials. Defendants’ claim overtly misrepresents what State officials said in depositions. For example, Dr. James Crutcher never “roundly rejected” the need for a study to assess bacteria in the IRW; he merely stated that it has not been done. This is a far cry from “roundly rejecting” as Defendants claim.

### **Background**

RCRA is pro-active and not reactionary. It recognizes that it is better to forestall an endangerment to human health than to respond to a human health or ecological problem after people have become sick or there has been an adverse effect on the environment. Thus, the State’s burden under RCRA does not require it to show that bacteria from poultry waste has caused an epidemic in the IRW. Rather, the State must only show that the land disposal of poultry waste in the amounts and by the methods employed by the Defendants *may present an imminent and substantial endangerment to human health and the environment*. 42 U.S.C. § 6972(a)(1)(B). The Tenth Circuit's *Burlington Northern* decision provides an explanation of what the State needs to prove in order to establish that Defendants’ conduct meets the RCRA standard..

With respect to the term "may," the Circuit explained:

[I]t is well established that the operative word in § 6972(a)(1)(B) is "may" . . . . This "expansive language" is "intended to confer upon the courts the

authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes."

*See Burlington Northern and Santa Fe Railway Co. v. Grant*, 505 F.3d 1013, 1019-21 (citations omitted) (emphasis in original).

With respect to the term "imminent," this Court explained:

[T]he term "imminent" is not defined by RCRA, however, the Supreme Court has held that "[a]n endangerment can only be 'imminent' if it threatens to occur immediately[.]" *Meghrig*, 516 U.S. at 485 (quotations omitted). Nonetheless, a finding of "imminency" does not require a showing that actual harm will occur immediately as long as the risk of threatened harm is present. *Id.* at 485-86 (holding that "there must be a threat which is present *now*, although the impact of the threat may not be felt until later") (quotations omitted). In other words, "'[a]n 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public.'" *Davis v. Sun Oil Co.*, 148 F.3d 606, 610 (6th Cir.1998) (quoting *Dague v. City of Burlington*], 935 F.2d [1343,] [] 1355-56 [(2d Cir. 1991)]); *see also United States Navy v. Price*, 39 F.3d [1011,] [] 1019 [(9th Cir. 1994)]. Imminence, thus, refers "to the nature of the threat rather than identification of the time when the endangerment initially arose." *United States Navy*, 39 F.3d at 1019 (citation omitted).

*Id.* (emphasis added).

With respect to the term "substantial," this Court explained:

[T]he word "substantial" is not defined in RCRA or its legislative history. Nonetheless, relevant case law has held that an endangerment is "substantial" under RCRA when it is "serious." This does not necessitate quantification of endangerment, as an endangerment is substantial where there is reasonable cause for concern that someone or something may be exposed to risk of harm by release, or threatened release, of hazardous substances in the event remedial action is not taken. As such, given RCRA's language and purpose, "if an error is to be made in applying the endangerment standard, the error must be made in favor of protecting public health, welfare and the environment."

*Id.* (citations omitted).

And finally, with respect to the term "endangerment," this Court explained:

[T]he term "endangerment" has been interpreted by courts to mean a threatened or potential harm, thus, it is not necessary that BNSF show proof of actual harm to health or the environment. *See Dague*, 935 F.2d at 1355-56; *United States v. Price*, 688 F.2d [204,] [] 211 [(3d Cir. 1982)]. In other words, injunctive relief is authorized when there may be a risk of harm. This gives effect to Congress' intent "to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes." *Dague*, 935 F.2d at 1355 (emphasis in original).

*Id.* (emphasis added). Using this standard the State's evidence will show that the Defendants' practice of land disposing more that 350,000 tons of waste each year in the IRW creates such a risk to human health. The State will also show Defendants' liability under the federal common law nuisance "significant threat of injury" standard, the 27A Okla. Stat. § 2-6-105A "likely to cause pollution," and state law nuisance "reasonably degree of probability" standard.

The State will prove that bacteria, (along with the adverse consequences of DBP production and blue green algae from the eutrophication caused by phosphorous) have demonstrably adverse health risks for those living in and recreating in the IRW. The State's experts provide compelling evidence as to the health effects of poultry bacteria in waters of the IRW from land application of poultry waste.

Defendants make two arguments as to why any evidence of adverse human health effects relating to bacteria should be excluded. First, Defendants argue that evidence of the harmful effects of bacteria is irrelevant under Fed. R. Evid. 401 and should thus be excluded under Fed. R. Evid. 402 because there is no evidence (now that PCA and PCR have been eliminated) that poultry waste bacteria is entering IRW waters. Second, Defendants argue that notwithstanding a finding that their bacteria is reaching IRW waters, the State has not offered evidence that bacteria in chicken and turkey waste has



the potential of causing a risk to human health. Of course, as explained below, the State does have other evidence (beyond PCA and PCR) that poultry bacteria are entering the surface and ground waters of the IRW. And, not surprisingly, there is ample evidence that ingestion of fecal matter from *any* warm blooded animal will result in a risk to that person's health.

### **Argument**

#### **A. Legal Standard**

When a federal court examines a motion *in limine*, the considered evidence “should be excluded . . . only when the evidence is *clearly* inadmissible on *all* potential grounds.” *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993) (emphasis added). It cannot be successfully argued that the State's evidence is inadmissible on *all* potential grounds; thus, the State's evidence regarding the existence, fate and transport of poultry waste bacteria and the potential health consequences of such bacteria should be admitted. In this case the State's evidence relating to the human health effects of poultry waste bacteria is relevant under Federal Rule of Evidence 401 because it tends to prove that the defendants' waste disposal practices create an imminent and substantial endangerment. Further, probative value of the State's evidence relating to the human health effects of bacteria is not substantially outweighed by concerns of Rule 403. The Defendants have simply not explained how the evidence of the hazards associated with poultry waste land disposal is prejudicial.

#### **B. The State's Evidence**

As noted above Defendants first argue that absent the PCA and PCR analyses the State can offer no evidence “linking” poultry waste to disease causing bacteria in the

IRW. The State will offer ample evidence that tends to link poultry waste to bacteria in IRW waters. For example, Dr. Teaf uses many lines of evidence in forming his opinion connecting IRW bacteria to the Defendants waste disposal practices. These lines of evidence are corroborated by other expert scientists of the State.<sup>1</sup> DKT #2062 ¶¶ 42-48; DKT #2067, Ex. 3 ¶¶ 12-14, 31-33 & 35 (Teaf Report) (detailing the multiple lines of evidence that he relies on to form his expert opinion that poultry waste disposal is a significant contributor to the nutrient and bacterial loads in the waters of the IRW). For instance, Dr. Teaf will explain that poultry waste, as a source, represents a major share of the contribution of indicator bacteria to the waters of the IRW. Dr. Teaf undertook an analysis of sources of indicator bacteria in the six counties of the IRW using USEPA techniques. Based on this analysis Dr. Teaf concluded that poultry waste is a significant contributor to the bacterial pollution of IRW waters. DKT #2067, Ex. 3 ¶ 25 (Teaf Report). Dr. Teaf's analysis was conducted using the procedures and standards for source identification and allocation used by state environmental agencies (including the State of Oklahoma DEQ) and the USEPA for the TMDL requirements of the Clean Water Act. *Id.* Pursuant to Dr. Teaf's analysis, he concluded that poultry are responsible for over 40% of the total fecal coliform loading in the IRW. *Id.* This analysis is also relied on by Dr. Harwood for her opinion that poultry waste is contributing to fecal bacteria in the IRW waters.

Drs. Teaf's and Harwood's conclusions do not rely on this analysis alone. They also rely upon Dr. Fisher's study of the geology of the IRW to aid in determining how

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<sup>1</sup> Indeed, as indicated above, at oral argument Defendants withdrew their motion for summary judgment on the State's RCRA bacterial case after the Court rejected their *Daubert* challenge to Dr. Teaf's testimony. Having withdrawn that motion, they cannot now challenge the adequacy of the State's evidence in a motion in limine.

poultry waste can be transported in the IRW environment from field surfaces to surface and ground waters. DKT #2156, Ex. 1 (Teaf Decl. ¶ 26); DKT # 2067, Ex. 3 (Harwood Dec. ¶ 33). Drs. Teaf's and Harwood's conclusions that poultry waste is a significant and substantial contributor to the bacterial loads of the IRW waters are also supported by the existing sampling by the USGS and other government agency reports. *Id.* Dr. Olsen has also reviewed the samples of poultry waste and has concluded that poultry waste contains high levels of fecal bacteria that is also present in edge of field runoff from fields with recent poultry waste application. Indeed, Dr. Olsen employs the traditional fate and transport method of comparing the levels of bacteria in waters closest to the waste release (edge of field samples) to each down-gradient environmental compartment until it reaches Lake Tenkiller to show that bacteria from land applied poultry waste is running off of land application areas and entering the streams and rivers of the IRW. Dr. Olsen analyzed ground water samples and found Defendants' waste contaminated ground water wells. *See*, Exhibit, 2, pp. 1-2, 6-4 – 6-19 & Table 6.4-3 (Olsen Report).

Dr. Fisher's testimony as well corroborates the fate and transport of the bacteria found in poultry waste. *See*, Exhibit, 1 (Fisher Report, pp. 42-46). Specifically Dr. Fisher will opine that the geology of the IRW makes it highly susceptible to infiltration and runoff of land applied poultry waste. Dr. Fisher's that a review of the IRW sampling demonstrates such runoff and infiltration. *Id.* Thus, the testimony of Dr. Roger Olsen with respect to PCA and the PCR testimony of Dr. Harwood are not the sole bases to support the State's case as to the fate and transport of poultry bacteria. On the other hand, Defendants cannot cite offer evidence in contravention of the simple fact that poultry

waste is a substantial contributor to both the nutrient and bacterial pollution of the IRW. *See* DKT #2062, ¶¶ 42-48.

With respect to Defendants' second argument, Drs. Teaf and Harwood, whom Defendants ignore in their Motion, opine as to the potential for harmful health effects as a result of bacteria originating from poultry waste in the IRW. Dr. Teaf noted higher than normal (statewide) rates of salmonellosis and campylobacteriosis in the two IRW counties. *Id.* ¶ 39. This high incidence of disease is evidence of a hazard from poultry operations. Further, despite Defendants' claims to the contrary Dr. Harwood relies on many lines of evidence in forming her opinions regarding potential health risks associated with poultry waste. Dr. Harwood states in her unopposed declaration: "[T]he poultry litter biomarker is *one* tool among many used to build the weight of evidence that land application of poultry litter represents a substantial danger to human health." DKT #2115, Ex. C ¶ 3 (Harwood Decl.). Dr. Harwood then specifically details the evidence that supports her opinion connecting the human health threat associated with poultry waste application. *Id.* at ¶¶ 3, 19 and 45.

In addition to the State's experts, government agencies and scholars have concluded that the bacterial pollution present in the IRW may be the result of poultry waste. *See, e.g.*, Exhibit 4 (the 2008 303(d) impaired waters list for the State of Oklahoma includes the sources of bacterial contamination in the IRW, including: animal feeding operations separate and distinct from CAFOs and land spreading of waste). *See also* DKT #2125 (Fact #27, Exs. 73, 74, 75, 76 & 77. Because the State's evidence of the harmful effects of bacteria found in poultry waste tends to make the existence of the State's allegations more probable, the evidence is relevant.

### C. Defendants' Rule 403 Objection

Federal Rule of Evidence 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid 403. This rule assumes the relevance of the presented evidence. Defendants have claimed that, assuming the State's adverse human health effects evidence is relevant, it should still be inadmissible because it would result in unfair prejudice, confusion and a waste of time. *See* DKT #2408, pp. 5-6. Determinations of inadmissibility under Rule 403 should be used sparingly. *See World Wide Ass'n of Specialty Programs v. Pure, Inc.*, 450 F.3d 1132 (10th Cir. 2006); *United States v. Tan*, 254 F.3d 1204, 1211 (10th Cir. 2001); *see also U.S. v. Morris*, 79 F.3d 409 (5th Cir. 1996); *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492 (11th Cir. 1986); *U.S. v. Cole*, 755 F.2d 748 (11th Cir. 1985); *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982), *rehearing denied* 693 F.2d 135, *certiorari denied* 103 S.Ct. 1774, 460 U.S. 1083, 76 L.Ed.2d 346, *on remand* 613 F. Supp. 1428; *Kehm v. Procter & Gamble Co.*, 580 F.Supp. 890 (N.D. Iowa 1982).

In the instant case, the probative value of the State's expert testimony and other evidence concerning the effects of bacteria and other compounds found in poultry waste is clear. This evidence proves the State's RCRA claim of imminent and substantial endangerment as well as its claim for injunctive relief under claims of public nuisance and trespass. The above referenced evidence links the Defendants' practices to increased

bacteria in IRW waters and the bacteria found in poultry waste presents a substantial, pathogenic risk.

The Tenth Circuit has held: “In performing the 403 balancing, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.” *World Wide Ass'n of Specialty Programs v. Pure, Inc.*, 450 F.3d 1132 (10th Cir. 2006) *citing Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1274 (10th Cir. 2000). Defendants must successfully show that the **prejudice is unfair** and the danger of such unfair prejudice **substantially outweighs the probative value** of the evidence. Defendants’ argument regarding Rule 403 is conclusory in nature. Defendants offer nothing to explain why any of the State’s evidence pertaining to bacteria would be prejudicial other than it would prejudice *their* case because it tends to prove the State’s case.

Lastly, Defendants have not demonstrated how any prejudice or risk jury confusion outweighs the clear probative value of the State’s evidence of risk to public health from bacteria in poultry waste. Moreover, there is no reason to believe that discussion of the harmful human health effects of poultry waste will actually confuse the issues, mislead the jury, unduly delay the trial, waste time, or be needlessly cumulative. This relevant evidence of an endangerment or threat to public health, the trial will not “unduly” delay the trial, but instead is crucial to the State’s RCRA, public nuisance, and trespass claims.. *Johnson v. Ashby*, 808 F.2d 676, 678 (8<sup>th</sup> Cir. 1987) (“[I]t may be an abuse of the trial court's discretion to exclude probative, non-cumulative evidence simply because its introduction will cause delay”). In fact, it is imperative to the State’s case.

Accordingly, Rule 402 does not require this evidence to be excluded; on the contrary Rule 401 supports its admission.

### **Conclusion**

Contrary to Defendants' assertion, at trial the State will demonstrate that bacteria from Defendants' poultry waste is contaminating the waters of the RIW. Further, the State's evidence demonstrating the harmful human health effects of bacteria in poultry waste is relevant and probative for the issues of imminent and substantial endangerment to human health. That probative value outweighs any of the unspecified concerns of the Defendants under Rule 403. Because the State's evidence relating to the harmful human health effects of bacteria and other compounds found in poultry waste is relevant, probative and not prejudicial, Defendants' Motion pursuant to Federal Rules of Evidence 401, 402 and 403 should be denied.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_ day of \_\_\_\_\_, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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